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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 23 2010

LIN 06 144 50308

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an art studio. It seeks to employ the beneficiary permanently in the United States as a sculptor, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petitioner asserts that the beneficiary qualifies for Schedule A, Group II designation. The petition is accompanied by an uncertified Form ETA 9089, Application for Permanent Employment Certification. [1]

The director found that the petitioner has not established three of the six criteria outlined in 8 C.F.R. 204.5(K)(3)(ii) with regard to visa eligibility classification, while the petitioner had established two of the seven criteria outlined at 20 C.F.R. 656.15(D), namely, the (iii) published material in professional publications about the alien, and (vii) evidence of the display of the alien's work. Thus the director determined that the petitioner had not established the beneficiary's eligibility for the visa eligibility classification.

The beneficiary holds a bachelor's degree[2] and almost three years of work experience[3] as a sculptor working for the petitioner. The beneficiary is not eligible for visa eligibility consideration as a professional with an advanced degree or its equivalent, a bachelor's degree with five years of progressive work experience in the proffered position.[4] Thus, the petitioner seeks to classify the beneficiary as an alien of exceptional ability as outlined at 8 C.F.R. § 204.5(k)(3)(ii).

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[1] The AAO notes that the petitioner filed a subsequent I-140 petition under the EB2 alien of exceptional ability classification that was approved by the Texas Service Center on October 7, 2009. The AAO notes that this petition was accompanied by more extensive and long-term documentation of the beneficiary's further work and acclaim.

[2] The record contains the beneficiary's Bachelor in Fine Arts diploma and transcripts from the School of Visual Arts, New York City, New York issued in 2002.

[3] The petitioner's uncertified Form ETA 9089 indicates the petitioner has employed the beneficiary from June 2003 to the date he signed the Form ETA 9089, April 4, 2006, or two years and ten months.

[4] In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

On appeal, the petitioner states the director's decision is arbitrary, irrational and contrary to law. Counsel states that the petitioner has established that the beneficiary possesses a degree of expertise as a sculptor that is significantly above that ordinarily encountered in the field, and that the petitioner has submitted documentation that the beneficiary has performed in a leading or critical role for organizations and establishments having a distinguished reputation; has submitted evidence of the display of the beneficiary's work at artistic exhibitions and showcases, and has submitted published materials about the beneficiary in professional or trade publication or other major media. Counsel also states that the director determined that the beneficiary satisfied the heightened standard for Schedule A designation, but failed to satisfy the lesser standard for the E21 visa classification. Counsel states this finding is arbitrary. Counsel notes that the evidentiary criteria to which he refers apply to the first-preference alien with extraordinary ability (E11) classification, and that it follows that such criteria apply to and must be considered as comparable evidence in second preference (EB2) cases.

Counsel also states that four years ago, the beneficiary was found qualified for an O-1 nonimmigrant visa as an individual with "extraordinary ability " in the arts pursuant to U.S.C. § 101(a)(15)(o) and 8 C.F.R. § 214.2(o). Counsel states that the standard for an O-1 visa in the arts is identical to the standard for E21 immigrant classification. Counsel cites 8 C.F.R. § 214.2(o)(3)(ii) "Definitions. . . Extraordinary ability in the field of arts means distinction. Distinction means a degree of skill and recognition substantially above that ordinarily encountered." Counsel states that this previous decision underscores the arbitrary nature of the instant decision, since all of the evidence submitted in support of the instant petition relates to events that occurred after the beneficiary was deemed to have the requisite expertise.

The issues in this matter are whether the beneficiary is eligible for this classification based on United States Citizenship and Immigration Services (USCIS) regulatory criteria as outlined at 8 C.F.R.§ 204.5(k)(3)(ii) and whether the petitioner has established that the beneficiary qualifies for Schedule A, Group II designation as outlined in DOL regulatory criteria. The AAO will examine first whether the petitioner has established the beneficiary's eligibility for visa classification as alien of exceptional ability as stipulated by USCIS, and then examine the beneficiary's eligibility for Schedule A, Group II designation.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following information regarding labor certification and Schedule A designation:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-9089 in duplicate must accompany the petition. The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

Visa Classification Eligibility

The requirements for exceptional ability are set forth at 8 C.F.R. § 204.5(k)(3)(ii). Those requirements, which will be discussed in more detail below, include a degree or diploma, 10 years of experience in the occupation, a license to practice the profession or occupation, a salary consistent with exceptional ability, professional memberships and recognition for achievements. An alien must meet at least three of the regulatory requirements to qualify as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(iii) permits the petitioner to submit "comparable evidence" of exceptional ability, but only if "the above standards do not readily apply to the beneficiary's occupation." The regulation at 8 C.F.R. § 204.5(k)(3)(iii) does not suggest that submitting *one* type of "comparable evidence" can substitute for meeting *three* criteria.

As also stated above, the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The criteria follow.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability*

Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the beneficiary's education is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

The petitioner submitted the required initial evidence relating to this criterion, the beneficiary's diploma and transcripts from the School of Visual Arts, New York City. The beneficiary diploma

indicates he graduated with honors. This academic distinction indicates that the beneficiary's educational credential indicates a degree of expertise significantly above that ordinarily encountered. The beneficiary's instructors and mentors also described his work as an undergraduate student with impressive potential based on his woodworking skills and artistic sensitivity.[5]

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

On the Form ETA 9089, the beneficiary indicated that he had worked for the petitioner for two years and 10 months at the time he signed the document. The Form ETA 9089 indicates no earlier employment as a sculptor. The petitioner does not claim that the beneficiary meets this criterion and the record does not establish at least ten years of full-time experience in the occupation.

A license to practice the profession or certification for a particular profession or occupation

Section 203(b)(2)(C) of the Act provides that the possession of a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of exceptional ability. Regardless, the record contains no evidence that the beneficiary is required to or possesses a license for his profession or occupation.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The Form ETA 9089 indicates a proffered wage of $50,000. The petitioner has submitted no evidence as to wages paid to the beneficiary during his present employment with the petitioner prior to the establishment of the 2006 priority date. While numerous artists and sculptors may earn less than the proffered wage, the petitioner did not submit evidence that a wage of $50,000 is indicative of a degree of expertise significantly above that ordinarily encountered in the field of sculpture. Thus the petitioner has not established that the beneficiary meets this criterion.

Evidence of membership in professional associations

The petitioner does not claim that the beneficiary meets this criterion and the record contains no evidence relating to it.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The record contains letters from current collaborators, professional artists and mentors with longer experience in the contemporary art field that refer to the beneficiary's artistic skills in sculpture and

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[5] See letter from [redacted] petitioner's instructor at the School for Visual Arts, and [redacted] Fine Arts Department, School of Visual Arts, the beneficiary's professor as well as large scale public works artist.

the creation of large wooden outdoor art installations. The petitioner, an internationally acclaimed art studio, submits a letter of support extolling the beneficiary's artistic sensitivity and skills and states that future projects may not be feasible without the beneficiary's participation. The AAO notes that based on the I-140 petition, the petitioner employs only four workers, and that it hired the beneficiary shortly after his baccalaureate graduation. This fact adds significant weight to the beneficiary's recognized artistic skills. Three professional art organizations, Creative Time, New York; Weinstein Gallery, Minneapolis, Minnesota; and Art Lot, New York City, also provide recommendations as to the beneficiary's artistic promise and artistic and technical skills in particular in the area of public art, and innovative installation sites. Various directors of art galleries and museum directors in Gwangju, South Korean also contributed letters of recommendation describing the beneficiary's artistic work and his outdoor public art installation in South Korea in 2006. Thus, the petitioner has established that the beneficiary's peers, mentors, teachers, and other professional art administrators do recognize the beneficiary's achievements and significant contributions to the field of sculpture. Thus, the petitioner has established this criterion.

Nevertheless, the petitioner has not established that the beneficiary meets three of the regulatory criteria with evidence indicative of a degree of expertise significantly above that ordinarily encountered in the field. Even if we concluded that the beneficiary meets the criteria for which the initial required evidence was submitted, a university baccalaureate degree pursuant to the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A) and formal recognition from professional art organizations pursuant to the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F), the beneficiary would still only meet two criteria, not the required three. Thus, the petitioner has not established that the beneficiary is eligible for the exceptional ability visa classification.

With regard to counsel's assertion with regard to the O-1 petition approval, we do not find that an approval of a nonimmigrant visa mandates the approval of an immigrant visa. Each case must be decided on a case-by-case basis according to the evidence of record. While USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See e.g. Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Schedule A, Group II

In order to establish eligibility for Schedule A, Group II designation, the petitioner must establish that the beneficiary qualifies as an alien with exceptional ability *as defined by the Department of Labor.* This petition seeks to classify the beneficiary as an alien with exceptional ability in sculpture. 20 C.F.R. § 656.15(d)(1) provides, in pertinent part:

> An employer seeking labor certification on behalf of an alien to be employed as an alien of exceptional ability in the sciences or arts (excluding those in the performing arts) must file documentary evidence showing the *widespread acclaim and international recognition* accorded the alien by recognized experts in the alien's field; and documentation showing the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability.

(Emphasis added.)

Based on the record, the beneficiary has exhibited in New York, New Jersey, and South Korea. One exhibit for which documentation is submitted to the record is a student exhibit.[6] Other later New York/New Jersey exhibits include "How Do You Feel Today?, I Feel Great! And You?," an exhibit from March 21, to May 31, 2005, at Art Lot, a non-profit art space on the Brooklyn waterfront; "Hi, [redacted], You Know My Friend [redacted]. He is Having Dinner Tonight with His Girlfriend I Really Hope It Goes Well," a solo show at the Art Com Center, Fort Lee, New Jersey, September 14,-28, 2005; another group show "Cross Puzzle" at the ACC Gallery, Fort Lee, December 21, 2005 to January 10, 2006 Ft. Lee; and a group show in New York entitled "Nobody Sculpts" a group show sponsored by Nobody Works, New York. In response to the director's RFE, the petitioner submitted additional documentation with regard to the beneficiary's participation in a Museum Studio program at the Gwangju[7] City Museum and Art in the City project in Gwangju, South Korea in 2006 and his participation in the Gwangju Biennial. While the AAO notes that all of these exhibits occurred within a four year period of time, it would question whether such a limited geographic exposure constitutes widespread acclaim and international recognition.

In addition, the same provision outlines seven criteria, at least two of which must be satisfied for an alien to establish the widespread acclaim and international recognition necessary to qualify as an alien

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[6] See the press release for "Oilsexscrews" at the Visual Arts Gallery April 19, 2001 to May 5, 2001.

[7] The record contains two spellings of this Korean city: Kwangju and Gwangju. The AAO utilizes the Gwangju spelling in these proceedings.

of exceptional ability. Given the introductory language to the criteria emphasized above in 20 C.F.R. § 656.15(d)(1), the evidence submitted to meet these criteria should reflect "widespread acclaim and international recognition." The petitioner has submitted evidence that, it is claimed, meets the following criteria.

Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought.

The petitioner does not claim that the beneficiary meets this criterion and the record contains no evidence of prizes or awards for excellence received by the beneficiary for his work.

Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields.

The petitioner does not claim that the beneficiary meets this criterion and the record contains no evidence of the beneficiary's membership in international art associations that require outstanding achievements of their members as judged by recognized international experts.

Published material in professional publications about the alien, about the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material.

The petitioner submitted several articles in the Korean language with certified translations in response to the director's second RFE.[8] The petitioner also provide excerpts from *The Korea Media Yearbook*, 2005-2006 with regard to the circulation and overall standing of various newspapers that published the respective articles either the beneficiary's participation in a the Kwangju Museum Open Studio program or the Public Arts project in Kwangju part of a national public arts program done at the time of the Gwangju Biennale. The translations of the article *Hankyroyeh* by [redacted] describes the beneficiary's installation work at Open Studio Exhibition at the Gwangju Art Museum with fourteen other artists from within Korea or from abroad. The petitioner also submitted a lengthy Korean language article with certified translation, "Fall 2006, The Residency Program in Kwangju," written by [redacted] Gwangju Art Museum, published in *Epoque Arts* magazine October 2006, as well as an article entitled "A Bleak Poor Neighborhood Turned Into Gallery" published by CBS Nocutnews. The AAO notes that some articles refer to the overall program, rather than individual artists, although several feature photos of the beneficiary's work and of the beneficiary.

The petitioner also submitted articles from New York City publications including *NY Arts Magazine*, Spring 2006, and the *Asean News*, April 2005, that appear to be published as press releases or announcements of the exhibits, and are not viewed as published material from professional

[8] The AAO notes that these materials were somewhat disorganized in the record of proceedings as to which translation went with what Korean language article.

publications that provide any examination of the beneficiary's work in the field of large site specific art installations. The petitioner also submitted a copy of a brochure from "Art for Healing," described as a multi-art festival of 100 artists, held in the Chelsea neighborhood of New York City, May 13-28, 2006. On page 39, the beneficiary's work is featured as well as the beneficiary's description of his artistic vision. Thus, the AAO finds that the petitioner only submitted one article published by a professional art magazine to establish this criterion. Thus, the petitioner has not established this criterion.

Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought.

The petitioner does not claim that the beneficiary meets this criterion and the record contains no evidence of the beneficiary's participation on a panel or as a judge o the work of others in sculpture, in particular, site specific large wooden installations.

Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought.

The petitioner does not claim that the beneficiary meets this criterion and the record contains no evidence of the beneficiary's authorship of scientific or scholarly articles in the field of contemporary art, or large outdoor public art installations, primarily executed with wood.

Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation.

The petitioner does not claim that the beneficiary meets this criterion and the record contains no evidence of the beneficiary's authorship of published scientific or scholarly articles in the field of contemporary art, or large public art installations. The AAO notes that the beneficiary's exhibition work can not be considered as "comparable" evidence to meet this criterion pursuant to the regulation at 8 C.F.R. § 204.5(k)(3)(iii). This regulation relates to the criteria for classification as an alien of exceptional ability, provided at 8 C.F.R. § 204.5(k)(3)(ii), not Schedule A, Group II designation, defined by criteria set forth at 20 C.F.R. § 656.15(d)(1). Specifically, the regulation at 8 C.F.R. § 204.5(k)(3)(iii) provides that if "the above standards" do not readily apply, comparable evidence may be submitted. The regulation, promulgated by the Immigration and Naturalization Service (now USCIS), makes no reference to Department of Labor's regulation at 20 C.F.R. § 656.15(d)(1). Nothing in the regulation at 20 C.F.R. § 656.15(d)(1) suggests that comparable evidence may be submitted in lieu of evidence that directly meets a given criterion.[9]

[9] In the commentary to the newly promulgated regulations, DOL acknowledged receiving requests to add a "comparable evidence" provision. The final rule, however, includes no such provision.

Evidence of the display of the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

The petitioner has established that the beneficiary has exhibited either in group shows or solo shows in South Korea, and in New York and New Jersey, United States. Thus, the petitioner has established this criterion.

The director in her decision determined that the petitioner had established the third criterion outlined at 20 C.F.R. § 656.10(d), namely, published material in professional publications about the alien, about the alien's work in the field for which certification is sought; however, as discussed previously, the AAO does not find the petitioner's documentation for this criterion sufficient to establish the beneficiary's widespread acclaim and international recognition. The AAO therefore will withdraw the director's decision with regard to this criterion.

The documentation submitted in support of a claim of Schedule A exceptional ability must clearly demonstrate that the alien has achieved widespread acclaim and international recognition. The petitioner has shown that the beneficiary is a talented sculptor, who has won the respect of his collaborators, employers, and mentors. The record, however, stops short of elevating the beneficiary to having widespread acclaim and international recognition. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought. The AAO finds that the petitioner has not established three of the six criteria outlined in 8 C.F.R. 204.5(K)(3)(ii) with regard to visa eligibility classification, and the petitioner has only established one of the seven criteria outlined at 20 C.F.R. 656.15(D), namely, (vii) evidence of the display of the alien's work. Thus the AAO determines that the petitioner had not established the beneficiary's eligibility for the visa eligibility classification.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.